

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term

No. 83-11

CARLOS L. JIMENA,

Petitioner,

vs.

**BOARD OF REVIEW OF THE
UTAH INDUSTRIAL COMMISSION AND THE
UTAH DEPARTMENT OF EMPLOYMENT SECURITY,**

Respondents.

**BRIEF IN OPPOSITION TO GRANTING A
WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF UTAH**

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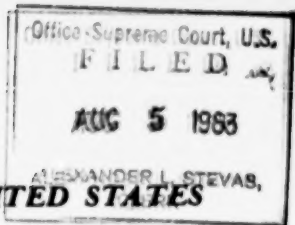
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INDEX

Page

Question Presented	1
Statutory Provision Involved	2
Statement of the Case	2
Reasons for Denying the Writ	4
I. THE RESULT BELOW ACCORDS WITH THE REQUIREMENTS OF DUE PROCESS AS DEFINED BY THIS COURT; IS NOT IN CONFLICT WITH THE DECISIONS OF THE HIGHEST COURT OF ANY OTHER STATE, ANY FEDERAL COURT OR THIS COURT; AND DOES NOT RAISE A SUBSTANTIAL ISSUE REQUIRING RESOLUTION BY THIS COURT	4
II. JURISDICTION OF PETITIONER'S CLAIM FOR UNEMPLOYMENT COMPENSATION PROPERLY REQUESTED IN THE COURT BELOW	14
III. CONCLUSION	22

TABLE OF AUTHORITIES

	<i>Page</i>
Barr v. United States , 478 Fed. 2d 1152 (1973)	8, 15
Board of Pharmacy of District of Columbia v. Feldman , 279 Fed. 2d 821 (1960)	10
Crow v. Industrial Commission of Utah , 140, P. 2d 321 (1943)	11
Feldman v. Board of Pharmacy of District of Columbia , 160 A. 2d 100 (1960)	10
Fusari v. Steinberg , 419 U.S. 379, 95 S.Ct. 533, 42 L.Ed. 2d 521 (1975)	7
Gamble-Skogmo, Inc., et al v. Federal Trade Commission , 211 Fed. Rptr. 2d, 106 (1954)	10
Graves v. Meystrik , 425 F.Supp., 40 (E.D. Mo., 1977), affirmed 431 U.S. 910, 97 S.Ct. 2164, 53 L.Ed. 2d 220 (1977)	6
Greenberg v. Simms Merchant Police Service , 410 So. 2d 566 (1982)	10
Gulf Oil Corporation v. Gilbert , 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)	16

TABLE OF AUTHORITIES (Continued)

Page

International Shoe Company v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 ALR 1057 (1945)	17, 19
Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, L.Ed. 2d (1976)	5, 6, 7, 13
Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877)	17
Simmons v. District Unemployment Compensation, 292 A. 2d 797 (1972)	10
Slattery v. California Unemployment Insurance Appeals Board, 60 Cal. App. 3d 245, 131 Cal. Rptr, 422 (1976)	10
Torres v. New York State Department of Labor, 333 F.Supp. 431 (S.D.N.Y., 1971) affirmed 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed. 2d 228 (1972)	6

CONSTITUTIONAL PROVISION STATUTES OTHER AUTHORITIES

	<i>Page</i>
United States Constitution	
Fourteenth Amendment	5
Tenth Amendment	17
United States Code	
28 U.S.C. § 1343(a)	2
Utah Code Annotated, 1953, as amended	
35-4-6	8
35-4-6(a)	14
35-4-6(c)	14
35-4-10	6, 14, 15
35-4-10(b)	15
35-4-10(c)	15
35-4-10(i)	15
35-4-10(j)	14
35-4-22(m)(1)	3

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BRIEF IN OPPOSITION TO GRANTING A
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The Respondents, Board of Review of the Utah Industrial Commission and Utah Department of Employment Security respectfully urge that a writ of certiorari should not issue to review the Judgment of the Supreme Court of the State of Utah entered May 11, 1983.

QUESTIONS PRESENTED

Respondents consider the questions presented to be:

1. Whether the use of telephonic hearings by a State agency to determine the eligibility of claimants for unemployment compensation violates the due process requirement of the Fourteenth Amendment of the United States Constitution; and
2. Whether the Utah Supreme Court is deprived of jurisdiction by reason of a claimant having residence in a foreign state.

STATUTORY PROVISION INVOLVED

It is the contention of Petitioner that jurisdiction of his claim for unemployment benefits is placed in the United States District Court for the State of Oregon, by virtue of Title 28, United States Code, § 1343(a); which provides in part as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT OF THE CASE

Respondents substantially agree with the statement of the case set forth in the petition by Petitioner. Petitioner was originally denied

unemployment benefits beginning August 1, 1982 pursuant to Section 35-4-22(m)(1), which provides in part:

An individual is deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with the respect to the week are less than his weekly benefit amount.

Petitioner does not allege a Federal question with respect to the above-quoted provision of law. Rather, he contends factual error in the application of the provision to his case. Petitioner appealed the denial of unemployment benefits but refused to participate in a telephonic hearing. The Appeal Referee issued a default decision affirming the denial of benefits, from which the Petitioner made timely appeal to the Board of Review of the Industrial Commission of Utah. Upon review, the Board of Review remanded the case to the Appeal Referee with instructions to conduct a complete hearing with the Petitioner to ascertain the facts of the case. Upon receipt of notice of the hearing, Petitioner filed a document entitled "Objection to Venue, Jurisdiction, Procedure and Motion to Forward Entire Records of the Case to the U. S. District Court of Portland, Oregon." Petitioner's objection was overruled and his motion for a transfer of records to the U. S. District Court for Oregon was denied and the Appeal Referee

proceeded with the hearing. At the hearing, Petitioner again refused to participate on the grounds that the telephonic hearing procedure violated his right to due process. The Appeal Referee again affirmed the denial of unemployment benefits and Petitioner appealed a second time to the Board of Review of the Industrial Commission of Utah. The Board of Review affirmed the Appeal Referee. Petitioner appealed to the Utah Supreme Court which also affirmed the Board of Review. Petitioner now seeks a writ of certiorari from this court for review of the decision of the Supreme Court of Utah.

The Federal question raised by Petitioner before this court is whether the Utah Department of Employment Security may require Petitioner to participate in a telephonic hearing to ascertain the facts concerning his eligibility for unemployment benefits and whether the Department of Employment Security of the Industrial Commission of Utah and the Utah Supreme Court must waive jurisdiction in favor of the Federal District Court for the State of Oregon.

REASONS FOR DENYING THE WRIT

I. THE RESULT BELOW ACCORDS WITH THE REQUIREMENTS OF DUE PROCESS AS DEFINED BY THIS COURT; IS NOT IN CONFLICT WITH THE DECISIONS OF THE HIGHEST COURT OF ANY OTHER STATE, ANY FEDERAL COURT OR THIS COURT; AND DOES NOT RAISE A SUBSTANTIAL

ISSUE REQUIRING RESOLUTION BY THIS COURT.

Petitioner contends that the telephonic hearing procedure utilized by the Utah Department of Employment Security in hearing appeals on interstate claims for unemployment compensation violates the due process requirement of the Fourteenth Amendment of the United States Constitution. It is Petitioner's position that due process requires the Appeal Referee or other hearing officer to be able to observe the "demeanor" of each witness in the hearing, and that any procedure which eliminates the opportunity to observe such demeanor is violative of due process. Thus, Petitioner's claim pertains to an alleged violation of procedural due process.

The requirements of procedural due process in social welfare cases have been thoroughly explained by the court in the case of *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, L.Ed. 2d (1976). In a careful analysis of the case law concerning procedural due process in social welfare cases, the court stated that:

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner. . ."

These decisions underscore the truism that "[d]ue process, 'unlike some legal rules, is not a technical conception with a

fixed content unrelated to time, place and circumstances.' . . . '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Ibid*, 96 S.Ct., at 902. [Citations omitted.]

The court then went on in the *Matthews* decision to explain the factors involved in determining the requirements of due process in social welfare cases, those factors being: 1) private interest to be affected by official action; 2) the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards; and 3) the government interest involved, including the fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government. Although the *Matthews v. Eldridge* decision involved a disability insurance program, this court has been consistent in applying the *Matthews* interpretation of due process in unemployment insurance cases. See *Torres v. New York State Department of Labor*, 333 F. Supp. 431 (S.D.N.Y., 1971), affirmed 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed. 2d 228 (1972); and *Graves v. Meystrik*, 425 F.Supp. 40 (E.D. Mo., 1977), affirmed 431 U.S. 910, 97 S.Ct. 2164, 53 L.Ed. 2d 220 (1977).

Analyzing the facts of the instant case against the test set forth in *Matthews*, it is apparent that the procedures utilized by the Utah Department of Employment Security are consistent with the requirements of due process and are designed to facilitate the proper payment of benefits to those

who are unemployed through no fault of their own. The first factor to be considered is the private interest to be protected. This court has previously held that receipt of disability benefits and unemployment benefits do not rise to the same level as receipt of welfare assistance. See *Matthews v. Eldridge*, *Supra*, and *Fusari v. Steinberg*, 419 U.S. 379, 95 S.C.T. 533, 42 L.Ed. 2d 521 (1975).

This court explained that the welfare assistance program differs from other social welfare programs in that such other programs are not based on financial need. *Id.*, 96 S.Ct. at 905.

The second factor to be considered is the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguard. In the instant case, the petitioner made a written report that he had entered into self-employment as a private detective, devoting substantially full time to that effort. Based on that report, a Department Representative issued a denial of unemployment benefits. The record in this matter will show that the Petitioner filed his appeal from that decision on August 26, 1982 and that a Notice of Hearing was issued on September 13, 1982, just 18 days after his appeal. A hearing was scheduled for September 23, 1982, less than 30 days after the Petitioner's denial of benefits. Petitioner's complaint is that he was offered only a telephone hearing and that he should have been allowed to present his case before the Federal District Court for the State of Oregon.

The jurisdiction of the Industrial Commission of Utah over claims for benefits and appeals concerning such claims is clearly established in Sections 35-4-6 and 35-4-10 of the Utah Code Annotated 1953. It should be noted that Petitioner filed his claim for unemployment benefits against the State of Utah from the State of Oregon. Petitioner cites the case of *Barr v. United States*, 478 Fed. 2d 1152 (1973) in support of the proposition that the interstate procedure concerning unemployment compensation cases "*permitted only the taking of testimony and transmitting the same to the state against which the claim was asserted.*" See Petitioner's Petition at page 16. The actual quotation from the decision of the Tenth Circuit Court of Appeals is as follows:

The interstate appeals procedure *permits* the taking of testimony before the Commission in the state of a claimant's residence and the transmitting of such testimony to the state against which the claim is asserted. With this the appellant was not content; but to more she was not entitled. 478 Fed. Rptr. 2d, at 1156.

It is important to note the distinction between the quotation given in Petitioner's Petition and what the court actually said. The court's decision did not limit the interstate procedure to the taking of testimony in one state and transmission to another state. The court cited the interstate procedure merely as permitting such in the administration of interstate claims. Furthermore, the court's conclusion was that the claimant was not legally

entitled to more than the procedure which was then utilized for interstate appeals. It should be noted in this regard that Petitioner herein is seeking substantially more than the Tenth Circuit Court stated was required.

For many years, eligibility issues concerning such interstate claims for benefits were addressed by means of a bifurcated hearing. That is, under the former procedures, a hearing officer for the State of Oregon would have conducted a hearing with the claimant in Oregon and transmitted an electronic tape recording or a transcript of that hearing to the hearing officer in Utah. The Utah hearing officer then would have made a decision after reviewing the tape recording or transcript of the Oregon hearing. This procedure left much to be desired. If an adverse party, such as an employer, was located in Utah or a third state, neither party would have had opportunity to effectively cross-examine the other party. Also, the hearing officer in the claimant's state of residence was frequently unfamiliar with the requirements of the liable state's unemployment law, and frequently would fail to ask pertinent questions necessary for a proper resolution of the case under the liable state's law. The telephonic hearing has been a developing response to the imperfections of the bifurcated hearing procedure. Clearly, the risk of an erroneous deprivation of the claimant's interest in unemployment benefits is equally as protected by the telephonic hearing procedure as it would have been under the bifurcated hearing procedure which the petitioner requests in his petition, at page 17.

Petitioner's primary concern with the telephonic hearing is his contention that the hearing officer is unable to observe a witness's demeanor. The cases cited by Petitioner do not support Petitioner's position on this question. On the contrary, several courts across the country have concluded that the telephonic hearing is a better procedural method for adjudicating interstate unemployment benefit appeals than the old bifurcated hearing method. See *Slattery v. California Unemployment Insurance Appeals Board*, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422 (1976); *Greenburg v. Simms Merchant Police Service*, 410 So. 2d 566 (1982). Even in those cases cited by Petitioner which might be considered supportive of his position, the courts did not require that the deciding officer must actually observe the demeanor of the claimant or witness. See *Gamble-Skogmo, Inc. et al v. Federal Trade Commission*, 211 Fed. Rptr. 2d, 106 (1954); *Feldman v. Board of Pharmacy of District of Columbia*, 160 A. 2d, 100 (1960); *Board of Pharmacy of District of Columbia v. Feldman*, 279 Fed. 2d 821 (1960); *Simmons v. District Unemployment Compensation*, 292 A. 2d 797 (1972). It should be specifically noted relative to the *Feldman* and *Simmons* cases that the decisions of the courts rested on the District of Columbia Administrative Proceedings Act and the requirements therein concerning interstate hearings. There are no such equivalent requirements in Utah, which does not have an administrative proceedings act at this point in time.

In support of Petitioner's contention that the decision maker must observe the demeanor of the

parties and witnesses before him/her, and in support of Petitioner's further contention that a writ of certiorari should be granted in the instant matter because the decision of the court below conflicts with a prior decision of that court concerning the issue of demeanor, Petitioner has cited the case of *Crow v. Industrial Commission of Utah*, 140, P. 2d 321 (1943). Like the District of Columbia cases, the Utah Supreme Court in the *Crow* decision did not require that the decision maker actually observe the demeanor of the witnesses; but only that the decision maker have access to the opinion of the hearing officer who conducted the hearing with respect to the testimony provided in the hearing. The court pointed out that its decision in this regard was in harmony with the law on the question regarding commissions and quasi-judicial triers of fact in the Federal courts, citing Treatise and Case Authorities. See *Crow v. Industrial Commission, Supra*, at 322, 323.

Petitioner contends that having the records of his case transmitted to the Federal District Court for the State of Oregon or having the Oregon Employment Security Office conduct the hearing on his case were better alternatives than the telephonic procedure. Another alternative mentioned and rejected by Petitioner would be for him to travel to Utah for an in-person hearing before the Utah Appeals Referee. This alternative was rejected by Petitioner because of the cost. Each of the other alternatives suggested by Petitioner have inherent weaknesses. The Federal District Court could have acquired jurisdiction in the case only

upon a proper filing by the Petitioner in that court. The Industrial Commission of Utah could not confer jurisdiction upon that court by simply transmitting the records to it. This point will be more fully discussed in Point II herein. The weaknesses of the former procedure of having a hearing officer for the State of Oregon conduct the hearing with the claimant in Oregon have already been discussed herein.

The telephonic hearing is a procedure designed to minimize the cost to a claimant who desires to pursue an appeal of his eligibility for unemployment benefits, while affording the Appeal Referee who would be making the decision an opportunity to talk directly with the claimant during the hearing. Also, where other parties and witnesses are involved, the telephonic hearing provides an opportunity for each of the parties to cross-examine the witnesses of the other party. While the telephonic hearing procedure may not be a perfect solution to the problem of hearing interstate unemployment insurance appeals, it at least provides the decision maker with an opportunity to directly hear the witnesses and to ask questions of the witnesses as dictated by the requirements of local law. Such a procedure would appear to be at least equal to the procedure proposed in the cases from the District of Columbia and those proposed by Petitioner. Furthermore, the Federal District Court for Oregon simply did not have jurisdiction to determine the issue of Petitioner's eligibility for benefits under the Utah Employment Security Act because of the failure of

the Petitioner to properly file pleadings with that court.

The final factor to be considered in determining the requirements of procedural due process is the government's interests, including the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail. The government's interest is in administering an unemployment insurance program involving thousands of people and thousands of claims for benefits each week in an efficient and cost effective manner. In analyzing the standards set forth in *Matthews v. Eldridge*, *Supra*, it is clear that the telephonic hearing is an effective and efficient method of protecting an individual's interests and continued receipt of unemployment benefits, particularly when contrasted with other available alternative procedures.

In summary, the requirements of procedural due process are flexible, requiring an analysis of the governmental and private interests that are affected. Such an analysis in the instant case shows that the telephonic hearing procedure offered Petitioner an effective process for asserting his claim to unemployment benefits. As this court stated in *Matthews v. Eldridge*:

All that is necessary is that the procedures be tailored in light of the decision to be made to "the capacities and circumstances of those who are to be heard," [citation omitted] to ensure that they are given a meaningful opportunity to present their case. In assessing what

process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. 96 S.Ct., at 909.

It is clear from the foregoing that the instant matter does not raise a substantial issue requiring resolution by this court.

II. JURISDICTION OF PETITIONER'S CLAIM FOR UNEMPLOYMENT COMPENSATION PROPERLY RESTED IN THE COURT BELOW.

Section 35-4-6, subparagraphs (a) through (c), Utah Code Annotated 1953, established the jurisdiction of the Industrial Commission of Utah to determine the eligibility of individuals claiming unemployment benefits, and the right of such individuals to appeal from adverse decisions of the commission. Section 35-4-10, Utah Code Annotated 1953, establishes the appeals tribunal and review by the Utah Supreme Court, and concludes with subparagraph (j) which reads as follows:

The procedure herein provided for hearings and decisions with respect to any decision or determination of the commission affecting claimants or employing units under this act and for appeals shall

be the sole and exclusive procedure notwithstanding any other provision of this act.

Section 35-4-10 of the Act provides for appeal from an adverse decision to an appeal referee, who is required to conduct a fair hearing [35-4-10(b)] and to render independent judgment in the matter [35-4-10(c)]. Appeal may then be taken to a board of review, which is appointed by the Governor of the State of Utah. Any party receiving an adverse decision from the Board of Review has the right under Section 35-4-10(i) of the Act to petition the Utah Supreme Court for judicial review.

Petitioner alleges that jurisdiction should reside with the Federal District Court for the State of Oregon on the grounds that he is an Oregon resident, and on the further grounds of forum non conveniens. The fact remains that the Petitioner earned his base period wage credits while working in the State of Utah and that he filed his claim for benefits against the State of Utah. Even though the petitioner resides in the State of Oregon, the Industrial Commission of Utah retains jurisdiction to determine the Petitioner's eligibility for unemployment benefits by virtue of the statutory provisions cited above. See also *Barr v. United States, Supra*. Furthermore, as has been pointed out previously herein, Petitioner has at no time during the course of proceedings in this case filed an action in the Federal District Court with respect to his constitutional claims, nor did he file a removal action to have the case transferred from the Utah Supreme Court to the U.S. District Court for Oregon. Under such circumstances, Petitioner

has not properly invoked the jurisdiction of the Federal District Court.

With respect to the petitioner's contention that he is entitled to transfer of his case to the U.S. District Court for the State of Oregon under the doctrine of forum non conveniens, it is sufficient to point out that the case cited by Petitioner in support of this contention, *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), is not at all supportive of Petitioner's contention. In fact, this court held in the *Gulf Oil Corporation* case that a Federal court is not bound to respect the choice of a plaintiff no matter what the type of suit or issues involved, but may under proper circumstances decline jurisdiction. Further, this court explained that the principle of forum non conveniens is to permit a court to resist imposition upon its jurisdiction even when such jurisdiction is authorized by a statute. In the instant matter, the Petitioner has made no effort to properly invoke the jurisdiction of the U.S. District Court for Oregon.

Finally, the considerations to be weighed in determining whether a court should decline to exercise jurisdiction under the doctrine of forum non conveniens, as set forth in *Gulf Oil Corporation v. Gilbert*, *Supra*, actually operate in favor of the Industrial Commission in the instant matter. However, such considerations are not reached in this case due to the petitioner's failure to properly invoke the jurisdiction of the Federal Court.

With respect to Petitioner's contention that

requiring him to participate in a hearing conducted by an agency of the State of Utah is violative of the Tenth Amendment of the United States Constitution, it should be noted that Petitioner's contention is based on the decision of this court in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). The doctrine of *Pennoyer v. Neff* has long since been modified by other decisions of this court, particularly in the case of *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 ALR 1057 (1945). *International Shoe* is a case involving an attempt by the Washington Employment Security Division to collect delinquent unemployment taxes from a corporation which had no offices in the State of Washington but did have sales representatives operating within the state. Referring to *Pennoyer v. Neff*, the court pointed out that one state may obtain personal jurisdiction over a party in another state if that party had certain minimum contacts with the first state such that maintenance of the suit would not offend traditional notions of fair play and substantial justice.

Although the instant matter is not exactly identical with *International Shoe Co.*, the basis of jurisdiction for the Utah Industrial Commission to hear and decide the Petitioner's appeal is even stronger. In the instant matter, the Commission has not sought an in-personam judgment against the Petitioner. Rather, Petitioner is seeking benefits from the State of Utah in the form of unemployment compensation. As cited previously herein, the Utah Employment Security Act specifically grants to the Industrial Commission and

the Utah Supreme Court the authority to act upon such claims. Petitioner's arguments that the Commission and the Utah Supreme Court have no jurisdiction in this matter should, therefore, be rejected by the court.

Finally, Petitioner contends in his petition for writ of certiorari that he made only a "special appearance" to challenge the jurisdiction over his person of the Utah Industrial Commission, and that he did not refuse to participate in the hearing before the Appeal Referee. Petitioner's contention that he made only a special appearance to contest jurisdiction is without merit. Petitioner made no mention of a "special appearance" until his appeal to the Utah Supreme Court. Petitioner's actions in this regard have been solely to attempt to improperly invoke the jurisdiction of the U.S. District Court for the State of Oregon by insisting that the Utah Industrial Commission transfer its records in this matter to the Federal District Court, without the filing of any pleadings in that court by Petitioner.

Petitioner further argues his case on its merits before this court. The factual issues raised by Petitioner before the Utah Supreme Court and this court would all be valid issues had Petitioner chosen to participate in the hearings provided for him. However, when Petitioner elected instead not to participate in the hearings, he prevented the Utah Industrial Commission from inquiring into the facts concerning whether he had earnings from his self-employment; whether his self-employment is secondary to his search for work; or even whether Petitioner should be entitled to benefits despite his

self-employment and any earnings he might receive therefrom, provided those earnings would be less than his weekly benefit amount. Petitioner by his own actions has prevented the Utah Industrial Commission from carrying out its responsibility to make findings concerning these matters. Under such circumstances, Petitioner has failed to establish his entitlement to unemployment benefits. Respondents herein pointed out to the Utah Supreme Court and again herein wish to point out to the Petitioner that he may at any time simply request reopening of his claim by the Utah Industrial Commission, whereby the Commission could then investigate to its satisfaction the question of Petitioner's involvement in self-employment and resolve the issue of his eligibility for benefits. Until Petitioner makes himself available to the Commission for a proper investigation of the facts of his eligibility, the Commission has properly denied him benefits.

CONCLUSION

The telephonic hearing procedure utilized by the Utah Industrial Commission for the hearing of interstate appeals in unemployment compensation cases does not violate the requirements of procedural due process as established by this court. The result in the court below is not in conflict with the decisions of the highest court of any other state, any federal court or this court and does not raise a substantial issue requiring resolution by this court. Jurisdiction of Petitioner's claim for unemployment compensation properly rested

with the Utah Industrial Commission and the court below. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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